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No. 00-489

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Petitioners,

v.

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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FURTHER REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Conflicts With Decisions Of The Fifth, Sixth And Eighth Circuits On An Important Question Of Federal Law

Despite the Second Circuit's candid acknowledgment of the conflict between its decision and those of several other federal courts of appeals (App. A, 12a-13a), respondents argue unconvincingly that the Second Circuit's interpretation of "other legal process" as used in 42 U.S.C. § 407(a) does not conflict with the Fifth, Sixth and Eighth Circuits' interpretation of that phrase. *See Bradley v. Austin*, 841 F.2d 1288, 1294 (6th Cir. 1988); *Gorrie v. Bowen*, 809 F.2d 508 (8th Cir. 1987); *Norman v. St. Clair*, 610 F.2d 1228, 1243 (5th Cir.), *rehearing denied*, 617 F.2d 295 (5th Cir. 1980), *cert. denied sub nom. Schweiker v. Norman*, 453 U.S. 922 (1981). Respondents do not dispute that the Second Circuit's holding on the Social Security claim — that the attribution of Robert's social security to Nova constitutes an alienation of Robert's social security benefits — is fundamentally at odds with the holdings of these other circuits that the mere attribution of social security benefits among family members in determining an applicant's eligibility for public assistance does not alienate those benefits. Respondents rely on 42 U.S.C. § 407(b), which states only that a provision of law may not modify the anti-alienation protections of section 407(a) unless it contains an "express" cross-reference to section 407. But section 407(b) does nothing to minimize the conflict on the antecedent issue of whether attribution of income constitutes and alienation of income.

According to respondents, because *Norman* was decided in 1980, before the explicit cross-reference requirement of section 407(b) was enacted in 1983, "the limitations in that

statute were obviously not considered by that court" (Br., p. 2). The short answer is that the requirements of section 407(b) come into play only when the challenged action alienates the social security benefits by subjecting them to garnishment, levy, attachment or other legal process. If no alienation occurs, the statute in question need not cross-reference section 407(b). In *Norman*, the court held that the attribution of the social security benefits from their recipient to other family members did not alienate those benefits. *See Norman*, 610 F.2d at 1243. Thus, section 407(b) would have had no impact on the analysis of the *Norman* court.

Likewise unconvincing is respondents' argument that *Gorrie* and *Bradley* do not conflict with the Second Circuit's decision here. According to respondents, the statute in question in *Gorrie* and *Bradley* contained "an implicit cross-reference to section 407" whereas in the present case the spousal impoverishment provisions of the Medicaid Act contain "no cross-reference at all, either implicit or explicit" (Br., p. 2). Respondents, however, ignore that inasmuch as section 407(b) mandates an *explicit* statutory cross-reference to sustain a modification of the protections of section 407(a), an implicit cross-reference would have been insufficient to sustain the challenged attribution of income. Indeed, rather than relying on an implicit cross-reference theory, the Eighth and Sixth Circuits both squarely held — in direct conflict with the decision here, and in accord with the *Norman* court's analysis — that the attribution of social security benefits in the computation of the AFDC family unit's income did not violate section 407(a) because the attribution process did not seize the benefits or transfer them away from the beneficiary to others, but merely counted the benefits in determining the overall need of a family. *See Gorrie*, 809 F.2d at 517; *Bradley*, 841 F.2d at 1294. Thus, in *Gorrie* and

Bradley, section 407(b) was inapplicable because the attribution of the social security benefits did not alienate those benefits.

II. This Case Would Be Justiciable If This Court Grants New York's Petition But Denies The Conditional Cross-Petition

Respondents' justiciability argument is incorrect. Under the peculiar circumstances of this case, the portion of the Second Circuit's ruling relating to the ERISA claim, even if unreviewed, does not preclude the Robbinses from obtaining an increase in Nova's resource allowance. Respondents' argument is predicated on the assumption that Nova's resource allowance of $80,760 is immutable. In fact, she retains the right to seek an increase of this allowance in an administrative fair hearing that itself is subject to judicial review.

As noted by the Second Circuit (App. A, 6a n.1), following the entry of the district court's decision, the parties settled respondents' due process claims, in which Nova claimed that she had been denied proper notice of the availability of an administrative fair hearing to seek an increase in her resource allowance (App. B, 26a). The parties stipulated that if

> a decision is rendered in favor of [respondents] in [the Second Circuit] or the Supreme Court of the United States that 42 U.S.C. § 407 and/or 29 U.S.C. § 1056 was violated by either [petitioner], then if [respondents] request a fair hearing to increase the Community Spouse Resource Allowance for Nova Robbins within sixty (60) days of such court decision, [petitioners] will not consider it untimely under

> N.Y. Social Services Law § 22.4(a), and such fair hearing will be determined on the merits of [respondents'] claim that the Community Spouse Resource Allowance should be increased."[1]

If the fair hearing decision is adverse to the Robbinses, they may seek judicial review of it in state court pursuant to article 78 of New York's Civil Practice Laws and Rules ("C.P.L.R.").

In such a state court proceeding, the disposition of the ERISA claim in the State's favor would not preclude the Robbinses from obtaining an increase in Nova's resource allowance. While the doctrine of *res judicata* would preclude re-litigation in state court of the ERISA claim and any other claims that could have been raised in the prior federal action, *see Parker v. Blauvelt Volunteer Fire Co., Inc.*, 712 N.E.2d 647, 649-650 (N.Y. 1999), respondents could attempt to demonstrate that the agency's denial of Nova's request for an increase in her resource allowance was arbitrary and capricious, an abuse of discretion, not supported by substantial evidence or contrary to law. *See* N.Y. C.P.L.R. 7803(3), (4) (McKinney 1994); *see, e.g., Richardson v. Commissioner of New York City Dept. of Soc. Servs.*, 665 N.E.2d 1059 (N.Y. 1996) (reviewing fair hearing determination denying public assistance benefits). Accordingly, a case or controversy would continue to exist if this Court were to grant New York's petition but deny the conditional cross-petition.

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1. A copy of this stipulation and order is attached hereto as Appendix D. Following the entry of the Second Circuit's opinion, the district court so-ordered a stipulation (Appendix E) which extended respondents' time to request a fair hearing until sixty days after either (a) the time within which to file a petition for certiorari expires, (b) the denial of any such petition or conditional cross-petition, or (c) a decision by this Court if certiorari is granted.

III. Alternatively, If This Court Denies The Petition, It Should Vacate The Part Of The Judgment Relating To The Social Security Act Claim

If disposition of the ERISA claim in the State's favor would have rendered the Social Security Act claim academic, then the Second Circuit should never have reached the Social Security Act claim, and its purported holding on that claim is nothing more than an advisory opinion, an action "disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998). In that event, although the Second Circuit's ruling on the Social Security Act claim would not tangibly benefit respondents, its existence as precedent — it is expressly couched as a holding (App. A, 11a-12a) — would work detriment to New York and other States in future cases. Therefore, if this Court declines to review the question presented by petitioners and finds that the lower court's disposition of the Social Security Act claim was unnecessary in view of its disposition of the ERISA claim in the State's favor, it should modify the Second Circuit's judgment by vacating the part relating to the Social Security Act claim, and remand the matter to the Second Circuit with instructions that the Social Security Act claim be dismissed as moot. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)) (vacating judgment of the Court of Appeals with directions that the action be dismissed by the district court where plaintiff's case became moot during the pendency of the appeal).

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the decision of the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX D — STIPULATION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, SO ORDERED AUGUST 3, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

2d Cir. Docket No. 99-7663

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Plaintiffs-Appellants,

v.

BARBARA A. DeBUONO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Defendants-Appellees.

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the parties, that:

1. In the event that a decision is rendered in favor of plaintiffs in this Court or the Supreme Court of the United States that 42 U.S.C. § 207 and/or 29 U.S.C. § 1056 was violated by either defendant, then if plaintiffs request a fair hearing to increase the Community Spouse Resource

Appendix D

Allowance for Nova Robbins within sixty (60) days of such court decision, defendants will not consider it untimely under N.Y. Social Services Law § 22.4(a), and such fair hearing will be determined on the merits of plaintiffs' claim that the Community Spouse Resource Allowance should be increased; and

2. Plaintiffs' fourth and fifth claims are withdrawn, with prejudice.

Dated: August 3, 1999 S/ _____

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Dated: August 2, 1999 S/ _____

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Appendix D

Dated: August 3, 1999 S/ _____
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SO ORDERED:

FOR THE COURT
Karen Greve Milton, Acting Clerk
By
S/ _____
Frank J. Scardilli, Staff Counsel

APPENDIX E — STIPULATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED AS OF AUGUST 3, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action
#98-CV-6399 CJS

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Plaintiffs,

v.

BARBARA A. DeBUONO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Defendants.

STIPULATION

The parties in this action having entered into a Stipulation which was so ordered by the United States Court of Appeals for the Second Circuit, a copy of which is attached, and the Court of Appeals for the Second Circuit having issued a Decision reversing the Judgment of this Court in part and affirming it in part, and the mandate of the United States Court of Appeals for the Second Circuit having duly issued;

Appendix E

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the parties, that the time set forth in the aforesaid Stipulation and Order for plaintiffs to request a Fair Hearing to increase the Community Spouse Resource Allowance shall be extended so that if plaintiffs request a Fair Hearing to increase the Community Spouse Resource Allowance for Nova Robbins within sixty days of the later of a) the time within which a petition for Certiorari would be due, after any extensions therefore, to review the decision of the United States Court of Appeals for the Second Circuit in this action, or b) within sixty days of the date on which any Petition for Certiorari or Conditional Cross-Petition for Certiorari is denied by the Supreme Court of the United States in this action, or c) within sixty days of the date of any Decision by the United States Supreme Court in this action, defendants will not consider that request for a Fair Hearing to be untimely under New York Social Services Law § 22.4(a), and such Fair Hearing will be determined on the merits of plaintiffs' claim that the Community Spouse Resource Allowance should be increased.

Dated: July 26, 2000 S/ _____

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Appendix E

Dated: July 31, 2000

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Dated: August 3, 2000

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SO ORDERED:

Rochester, New York
August 9, 2000

S/ _____
HON. CHARLES J. SIRAGUSA, USDJ